

SUPREME COURT OF INDIA

State of Orissa

Vs.

Khirod Kumar Nayak

C.A.No.....of 2009

(Dr. Arijit Pasayat and Asok Kumar Ganguly JJ.)

23.02.2009

JUDGEMENT

Dr. Arijit Pasayat, J.

1. Delay condoned.
2. Leave granted.
3. Challenge in this appeal is to the order of a Division Bench of the Orissa High Court. Factual background can be adumbrated concisely as follows:
 4. The responded no.1 filed a writ application being OJC No.6857 of 1996 before the Orissa High Court claiming that he was appointed as "fourth peon" by the management of the concerned institution, which is an "aided educational institution" as defined under the *Orissa Education Act, 1969 (in short the `Act')* and *Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 (in short `Recruitment Rules')*. It is not in dispute that if an institution is an aided educational institution, same is governed by the Act and rules framed thereunder. The Recruitment Rules are framed under the Act. As the functionaries of the State did not approve the appointment holding the same to be beyond the prescribed yardstick, writ applications were filed for direction to the concerned authorities to accord approval to the appointment.
 5. The High Court by the impugned judgment in writ application came to hold that the functionaries of the State were not justified in refusing to accord approval. Stand of the State Government was that circular dated 8.7.1981 contained yardstick for fixation of standard staff for the Non- Government Secondary Schools in supersession of earlier circulars. Under the "category of staff" the number of peons who can be appointed was clearly spelt out. Only if the roll strength of the institution exceeded a particular number, one post of "Daftry" was admissible. According to the State Government the post of "Daftry" is a promotional post and, therefore, the concept of a "fourth peon" as sought to be canvassed by the writ

petitioners is without any legal foundation. The position was further clarified by Circular dated 27.3.1992. The High Court on consideration of the rival stands came to equate the "fourth peon" with "Daftry" and held the claim of the writ petitioner warranted acceptance.

6. In support of the appeal, learned counsel for the State of Orissa submitted that the High Court missed to consider several vital aspects.

“Firstly, there is no prescription of a "fourth peon" in the yardstick prescribed. The post of "Daftry" is a promotional post and it carries higher scale of pay. That being the position, the last entrant cannot claim the post of the "Daftry".”

7. Per contra, learned counsel for the writ petitioner submitted that the High Court has considered the circulars and come to the right conclusion that the claim for appointment as the "fourth peon" is legally enforceable.

8. At this juncture it is to be noted that at different points of time yardsticks were formulated. Government of Orissa, Education & Y.S. Department, issued Circular No. 28365-EYS dated 8.7.1981 fixing standard staff for the non-government secondary schools. So far as peons are concerned, the relevant portions of the circular read as follows:

“Category of staff 3 class 5class 7 class

9. Peons (I) Office Peon 1 1 1 (ii) Office Attendant 1 1 1 (iii) Night watcher cum sweeper 1 1 1 Notes

C)(ii) Where the roll strength of the school exceeds 100 one post of Daftry is admissible.”

9. Subsequently by another circular No.155000-XVIIIEP-50/91-E, dated 27th March, 1992 the position was further clarified as under:- "I am directed to say that the question of fixation of revised yardstick for appointment of class IV employees in Non-government Secondary Schools was under consideration of Government for some time past. After careful consideration Government have been pleased to decide that the yardstick for class IV employees of Non- Government Secondary Schools shall be as follows:

“Category of staff 3 class 5class 7 class (i) Office Peon 1 1 1 (ii) Science Attendant 1 1 1 (iii) Night Watcher cum 1 1 1 Sweeper Where the roll strength of 10 Class High School is 500 (five hundred) or more, one post of Daftry admissible.

For the schools running shift system for shortage of accommodation one additional post of peon is admissible.

The yardstick will come into force with effect from the 1st January 1992 and Government order referred to above stands modified to the extent indicated above.”

10. A comparison of the two circulars shows that under 1981 Circular the requisite roll strength was 100, which was changed to 500 subsequently in the 1992 Circular.

11. It is fairly accepted by learned counsel for the writ petitioner that the expression used in the two circulars is "Daftry" and not "fourth peon". The High Court seems to have fallen in error by proceeding on the basis as if the circulars referred to "fourth peon". This is clear from the reading of the various judgments impugned in this appeal.

12. It is to be noted that post of "Daftry" carries higher scale of pay and is a promotional post for class IV employees. That being the position, the High Court was not justified in directing approval of the writ petitioner's services as "fourth peon". But one significant aspect cannot be lost sight of. If a school was entitled to have a "Daftry", certainly the appointment was to be made by promoting one of the three persons i.e. Office Peon, Office Attendant and Night Watcher-cum-Sweeper, there being no other class IV post in the institution. It is for the Managing Committee of the institution to decide who is to be promoted and thereafter seek approval of the concerned authorities. That way the claim of the writ petitioner could have been considered by the authorities, on being appropriately moved by the management. It is undisputed that the writ petitioner was appointed by the managing committees', may be under a misreading of the relevant government orders.

13. We, therefore, while allowing this appeal direct that the management of the concerned institution shall move the concerned authorities for approval to the promotional appointment of a class IV employee, as "Daftry". Simultaneously, it can also recommend for appointment to the class IV post, in case approval is accorded to the recommendation for appointment of "Daftry" on promotion. The decision on both motions shall be taken within three months from the date of submission of the recommendation in accordance with law keeping in view the operative yardsticks in force at the time appointments were made. Even if there has been refusal earlier, the matter shall be reconsidered in the light of what has been stated above.

14. Before we part with this case we must indicate that undisputedly there were several decision of the Division Bench rendered at earlier points of time, taking a view contrary to the one taken in the impugned judgment.

“Learned counsel for the respondent (writ petitioner) fairly accepted that it is so. In fact, copy of one such decision dated 15.7.1996 in O.J.C. 5108/96 was placed on record and it has been brought to the notice of the learned Judges hearing the writ petition.”

15. The appeal is allowed in the aforesaid terms, leaving the parties to bear their respective costs.